Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Applications by Qwest Communications,	)	CC Docket No. 02-148
International, Inc., *et al.*	)	
for Authorization to Provide In-Region,	)	
InterLATA Services in Colorado, Idaho, Iowa	)	
Nebraska and North Dakota	)	

COMMENTS OF COVAD COMMUNICATIONS COMPANY

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Introduction

Covad Communications Company (Covad), by its attorneys, hereby respectfully submits its comments in opposition to the long distance applications submitted by Qwest in the above-referenced docket. Qwest prematurely seeks authorization from the FCC to offer in-region, interLATA services while substantial, competitively significant defects persist in several aspects of its application, including loop pricing, OSS, performance in providing competitors with nondiscriminatory access to UNEs, and performance reporting.

Covad is the leading nationwide provider of broadband connectivity using digital subscriber line (DSL) technology. Covad's nationwide facilities-based broadband network reaches nearly 45% of the nation's homes and businesses. Covad offers residential and business users a wide variety of innovative and competitively priced broadband services, and currently provides broadband connectivity to over a third of a million customers. Covad competes directly with the retail broadband offerings of Qwest and other Bell Operating Companies, providing vital innovation and price pressure on the Bells that has sparked widespread DSL deployment in the five years since Covad launched the first commercial DSL offering in the nation.

As a facilities-based provider, Covad relies on Qwest to provide unbundled transmission facilities (loops and interoffice transport) and the operations support systems (OSS) necessary to facilitate ordering and provisioning of such facilities. Covad is collocated in hundreds of central offices throughout the Qwest territory, and from those central offices, Covad offers consumers and small and medium-sized businesses a competitively priced alternative to Qwest's high-priced T-1 services. Covad also

provides residential consumers the nation's lowest price DSL offering, Telesurfer Link, which provides broadband connectivity at or below the price of dial-up services. In the face of these intense competitive pressures, Qwest has both the incentive and the ability to handicap Covad's pro-competitive offerings by denying, delaying, and degrading the UNEs that Qwest is required to provide. Given the current crisis in the telecommunications sector, consumers and competitive carriers need the Commission's honest and diligent evaluation of Qwest's compliance with its market-opening obligations now more than ever.

Covad's objections to Qwest's long distance applications[1] center primarily on checklist items two and four. Qwest's pricing for line shared loops in Colorado bears no relation to the Commission's TELRIC pricing principles, clearly violating the Commission's rules and prior orders governing the pricing of UNEs, including pricing of the high frequency portion of the loop (HFPL). Further, Qwest's application fails to make the requisite *prima facie* case that Qwest provides competitors with non-discriminatory access to its OSS for loop make-up information. KPMG's testing and Qwest's performance reporting fail to demonstrate that Qwest provides competitors with access to all loop qualification information available to Qwest personnel in a non-discriminatory manner. Moreover, as Covad's comments demonstrate, Qwest's OSS for providing loop makeup information to competitors is highly unreliable, and may not even contain all the loop makeup information Qwest has made available to outside plant personnel and, through them, potentially to retail sales personnel as well. Qwest's

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[1] Covad submits these comments in opposition to all five of Qwest's applications, but focuses on the factual record developed before the Colorado Commission. The issues raised in these comments have applicability throughout the Qwest region.

ordering and provisioning OSS fares no better. Qwest acknowledges that it essentially "fakes" its service order completion (SOC) notifications to competitors. Also, Qwest repeatedly sends out unreliable and erroneous firm order confirmation (FOC) notices to Covad. Moreover, KPMG's testing itself shows that Qwest's OSS is replete with human errors, *even for orders that should be treated as flow-through*. Qwest's actual performance in providing competitors with access to UNEs also falls short of its obligations. Specifically, Qwest repeatedly fails several of the performance metrics measuring its maintenance and repair of line shared loop UNEs. Furthermore, Qwest's stated "new build" policy places wholesale customers on a different footing than its retail customers, rejecting competitors' orders for lack of facilities while Qwest's retail customers are allowed to wait for facilities to become available. Qwest's "new build" policy also has the perverse effect of masking in Qwest's performance reports its delays in filling competitors' orders, because competitors' rejected and "held" orders are excluded from several provisioning metrics. Furthermore, Qwest's performance reporting in general is unreliable and inaccurate, as evidenced by the numerous (and, as far as Covad knows, unremedied) inaccuracies found by Liberty in its data reconciliation efforts, and by Qwest's failure even to produce any underlying data for a key provisioning metric.

The Commission must not allow Qwest to ignore the requirements of the competitive checklist in Section 271. Unless and until Qwest remedies the specific defects in its application discussed herein, the Commission must not grant Qwest's bid for Section 271 authorization.[2]

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[2] On May 24, 2002, the United States Court of Appeals for the District of Columbia Circuit issued its decision in *USTA v. FCC*, 290 F.3d 415. In *USTA*, the court remanded to the Commission its *UNE Remand*

1. **Qwest's Recurring Rate for the High Frequency Portion of the Loop Is A Clear Violation Of TELRIC.**

Qwest must be required to set the price for the high frequency portion of the loop ("HFPL") at the same price Qwest continues to charge itself: $0. This non-discriminatory price is the only method by which to remedy the *clear* violation of TELRIC perpetuated by Qwest and the Colorado Commission in, respectively, seeking and approving, a permanent, positive rate of $4.89 for the HFPL.

When the FCC issued its *Line Sharing Order* requiring ILECs to provide line sharing,[3] it specifically directed that the price of line shared loop UNEs "should be set by states in the same manner as they set the price for other unbundled network elements,"[4] and noted that virtually all states had already adopted and implemented a TELRIC methodology.[5] The FCC then provided a simple prescription for establishing a price for the line shared loop UNE utilizing TELRIC principles:

> In arbitrations and in setting interim prices, states may require that *incumbent LECs charge no more to competitive LECs for access to shared local loops than the amount of loop costs the incumbent LEC allocated to ADSL services when it established its interstate retail rates for those services.* This is a straightforward and practical

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and *Line Sharing* decisions, concluding that the Commission had not adequately explored certain factors in its implementation of section 251(c)(3) of the Act. The court's mandate must issue prior to the decision in *USTA* taking effect. As of the date of this filing (July 2, 2002), that mandate has not yet issued. Indeed, it is substantially likely that parties to the *USTA* case, including the Commission itself, may seek further judicial review of the *USTA* decision, which would further delay the issuance of the court's mandate. In short, although the Commission will continue its review of its current UNE rules in the Triennial Review proceeding, those UNE rules (including loops, linesharing, and OSS) remain in full legal force at this time, and were in force at the time the instant application was filed. As such, notwithstanding the *USTA* decision, Qwest must prove to the Commission that it is in full compliance with all of the Commission's UNE rules in order to satisfy its burden of proof pursuant to the competitive checklist of section 271 of the Act.

[3] *Line Sharing Order*, ¶ 4.

[4] *Line Sharing Order*, ¶ 135.

[5] *Line Sharing Order*, ¶ 132.

approach for establishing rates consistent with the general pro-competitive purpose underlying the TELRIC principles. We find that establishing the TELRIC of the shared line in this manner does not violate the prohibition in section 51.505(d)(1) of our rules against considering embedded cost in the calculation of the forward looking economic cost of an unbundled network element.[6]

The FCC went on to explain the reasons for its determination:

We find it reasonable to presume that the costs attributed by LECs in the interstate tariff filings to the high-frequency portion of the loop cover the incremental costs of providing xDSL on a loop already in use for voice services. Under the price cap rules for new access services, the recurring charges for such services may not be set below the direct costs of providing the service, which are comparable to incremental costs. The rates the incumbent LECs set for their special access xDSL services should cover those costs. *The incumbent LECs filed their cost support for their own special access DSL services before we issued the notice giving rise to this Order compelling line sharing, and they have defended their cost support when challenged in petitions to reject or suspend their tariff filings. Since the incremental loop cost of the high-frequency portion of the loop should be similar to the incremental loop cost of the incumbent LEC's xDSL special access service, this approach should result in the recovery of the incremental loop cost of the high-frequency portion of the loop.*[7]

The FCC took pains to make clear that its HFPL pricing guidelines were fully consistent

with TELRIC:

These guidelines either follow directly from the … TELRIC … methodology that the Commission set forth in the *Local Competition First Report and Order* to govern interconnection and unbundled network element pricing, or, if not a direct outgrowth of those principles, are consistent with them in the context of this particular unbundled network element.[8]

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[6] *Line Sharing Order*, ¶ 139 (emphasis added).

[7] *Line Sharing Order*, ¶ 140 (emphasis added).

[8] *Line Sharing Order*, ¶ 132.

In a later Order regarding access reform issues, the FCC clarified that this pricing principle for the HFPL is mandatory, not suggestive. The FCC stated:

> The Line Sharing Order concluded that states should not permit incumbent LECs to charge more to competitive LECs for access to shared local loops than the amount of loop costs the incumbent LEC allocated to ADSL services when it established its interstate retail rates for those services. [9]

It is now equally clear that TELRIC is the law of the land. The Supreme Court has stated, in no uncertain terms, that TELRIC is the only legally permissible methodology by which UNEs may be priced:

> The incumbents have failed to show that TELRIC is unreasonable on its own terms, largely because they fall into the trap of mis-characterizing the FCC's departures from the assumption of a perfectly competitive market (the wire-center limitation, regulatory and development lags, or the refusal to prescribe high depreciation and capital costs) as inconsistencies rather than pragmatic features of the TELRIC plan. Nor have they shown it was unreasonable for the FCC to pick TELRIC over alternative methods, or presented evidence to rebut the entrants' figures as to the level of competitive investment in local-exchange markets. *In short, the incumbents have failed to carry their burden of showing unreasonableness to defeat the deference due the Commission. We therefore reverse the Eighth Circuit's judgment insofar as it invalidated TELRIC as a method for setting rates under the Act.* [10]

For the Colorado Commission to state, in the face of the *Verizon* decision, that "[i]t is non-sensical to try and speak of HFPL pricing in terms of being TELRIC-compliant," only reinforces the fact that its decision is arbitrary, capricious and contrary to law which requires that all UNEs be priced at TELRIC.

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[9] FCC 00-193, Sixth Report and Order in CC Docket Nos. 96-262 and 94-1, Report and Order in CC Docket No. 99-249, Eleventh Report and Order in CC Docket No. 96-45 (May 31, 2000), at ¶ 98.

[10] *Verizon, Inc., v. FCC*, 535 U.S. ___, Slip Op., p. 52 (May 2002).

Qwest's FCC filings in support of its DSL tariffs show it has no loop cost, and no HFPL cost, in providing that service. During the Colorado cost proceedings, Qwest reaffirmed that it incurs no direct or incremental loop costs when providing the HFPL:

> Q: … are there any additional loop costs incurred when the high frequency portion of the loop is used . . . ?
>
> A: No. . . .[11]
>
> ***
>
> Q: … When I asked you if there are any additional loop costs in providing the high frequency portion, I thought your answer is, no, there are no additional loop costs.
>
> A: Right.[12]

Because there is no loop cost associated with the HFPL or the provision of DSL service, Qwest does not include any loop cost in its filed cost studies supporting its FCC tariffs for Qwest DSL (formerly, MegaBit) services.[13] Qwest even went so far as to explain that: "In the retail service environment for [Qwest DSL] service, the cost of the loop is attributed to basic service, and therefore there is no incremental cost of the loop attributed to [Qwest DSL]."[14]

It comes as no surprise that Qwest incurs no incremental cost in providing the HFPL. Almost three years ago, the FCC reached precisely this same conclusion in the

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[11] CO Cost Hearing Trans., 8/13/01 (Fitzsimmons), pp. 190:15-19.

[12] CO Cost Hearing Trans., 8/13/01 (Fitzsimmons), p. 191:20-24.

[13] CO Cost Hearing Trans., 8/13/01 (Fitzsimmons), pp. 225:14-25, 226:1-2.

[14] CO Cost Hearing Ex. FF (Gates Direct), p. 34 (citations omitted). Additionally, as Mr. Gates also testified, Qwest is not alone in allocating no incremental costs to the HFPL – GTE (now Verizon West), BellSouth and Verizon all have testified that there are no incremental costs incurred in providing the HFPL. *See* CO Cost Hearing Ex. EE (Gates Direct), pp. 45-46. *See also* CO Cost Covad Brief Exhibit 1, ¶ 20; *Line Sharing Order*, ¶¶ 41 and 55.

Line Sharing Order, finding that ILECs recover their embedded loop costs prior to leasing out the HFPL:

> The record indicates that incumbent LECs generally allocate virtually all loop costs to their voice services, then deploy a voice-compatible xDSL service such as ADSL on the same loop, allocating little or no incremental loop costs to the new resulting service.
>
> The incumbent's price, however, is significantly lower because the incumbent deploys its voice-compatible DSL service at little or no incremental cost by utilizing the same loop that it uses for local exchange service.[15]

Equally important, and equally supportive of a finding that the $4.89 HFPL rate constitutes a clear violation of TELRIC is the fact that Qwest never even attempted to show that it incurs costs in providing the HFPL. That is, Qwest never provided a cost study supporting its claimed costs. Standing alone, this failure too demonstrates a clear violation of TELRIC.

The FCC has made clear that the *only* method by which an incumbent LEC may prove that its rates are *cost-based* and compliant with FCC pricing rules is through a *cost study*:

> (e) Cost study requirements. An incumbent LEC *must prove* to the state commission that the rates for each element it offers do not exceed the forward-looking economic cost per unit of providing the element, *using a cost study that complies with the methodology set forth in this section and § 51.511*. 47 C.F.R. § 51.505(e) (emphasis added).

As the FCC further specified in the body of its pricing rules, a cost study sufficient to support a claim of cost-based pricing must include support for the joint or common costs associated with the UNE at issue:

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[15] *Line Sharing Order*, ¶¶ 41 and 55.

Cost studies must include the forward-looking cost over the long run of the total quantity of the facilities and functions that are directly attributable to, or reasonably identifiable as incremental to, such elements . . . measured based on the use of the most efficient telecommunications technology currently available and the lowest cost network configuration *[plus a] reasonable allocation of forward-looking common costs*. . . . 47 C.F.R. § 51.505.

The FCC's requirement of a cost study for both incremental and common costs is not mere recital. To the contrary, the FCC was emphatic that cost studies be the basis of any state commission pricing ruling by requiring the state commission to include such studies in the record relied upon to establish UNE rates. 47 C.F.R. § 51.505(e)(2).

Here, Qwest did not even make a pretense at providing, nor did the Colorado Commission ever require, cost support for the supposedly "negotiated" rate of $4.89 mandated by the Colorado Commission. To the contrary, Qwest relied solely on the testimony of its witnesses that a positive HFPL rate must be set. That testimony does not constitute a cost study, nor may it be deemed a substitute for a cost study since it does not comply with the requirements enumerated by the FCC at 47 C.F.R. § 51.505. Accordingly, because Qwest has failed to provide a cost study supporting *any* recurring rate for the HFPL, it has failed to sustain its burden of proof as to that rate. 47 C.F.R. § 51.505(e); *see also Mountain States Tel. & Tel. Co. v. Public Utils. Comm'n*, 763 P.2d 1020, 1031 (Colo. 1988) (movant bears the burden of proof). Had Qwest actually believed that it incurred, and then actually did incur, any incremental costs in providing the HFPL, such costs would be reflected in an appropriately prepared cost study. The absence of any such study is nothing more than a reflection of a lack of any actual costs.

Underscoring this violation of TELRIC are Qwest's ready admissions that its recommended price for the HFPL is arbitrary and not founded in any type of cost

analysis.[16] In fact, Qwest witness Fitzsimmons testified that the appropriate price could

be anywhere from "$1 to the entire cost of the loop."[17] Likewise, Qwest witness

McDaniel testified that:

> Q: Would you agree that the reasonable portion of the cost
> that could be allocated, could be $1, $5, $50, depending
> upon what the cost of the loop is?
>
> A: Allocation always involves judgment. And we try to use
> judgment based on some of the negotiations we have
> had with CLECs, some of the other -- we're trying to
> find out what the market price should be. And as I said
> in my testimony, we could adjust that over time; but we
> did that based on some of our experience we had.[18]

Qwest proposed and the Colorado Commission approved a purportedly

"reasonable" price,[19] but its economist agreed that Qwest has no knowledge or idea as to

what the correct rate for the HFPL is.[20] Under Qwest's approach, therefore, there is no

empirical or even anecdotal data upon which the Commission may rely in establishing

the HFPL rate; rather, Qwest picked a "market-based" number that it likes, but cannot

support. Tellingly, Qwest's proposed "joint cost" of the HFPL has been a constantly

moving target, adjusted by Qwest as it determines what rate will or will not "fly." For

example, in Minnesota, Qwest advocated a HFPL rate of 50% of the unbundled loop

rate.[21] When that ploy proved unsuccessful, Qwest adopted a new tactic, advocating in

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[16] CO Cost Hearing Trans., 8/13/01 (Fitzsimmons), pp. 206:1-25 – 208:1-19.

[17] CO Cost Hearing Trans., 8/13/01 (Fitzsimmons), p. 208:15-19.

[18] CO Cost Hearing Trans., 8/10/01 (McDaniel), p. 232:1-5.

[19] CO Cost Hearing Ex. P (McDaniel Direct), pp.15-16.

[20] CO Cost Hearing Trans., 8/13/01 (Fitzsimmons), p. 206:14-18.

[21] CO Cost Covad Brief Exhibit 1 (*MN Line Sharing Order*), ¶ 28.

Washington that the HFPL rate should be up to 50% of the unbundled loop rate, capped at $10.[22]   Then, in Colorado, Qwest proposed a $5.00 rate, but happily accepted the $4.89 rate.

Importantly, the FCC has already rejected what is, in essence, a value-based rate that Qwest espouses and the Colorado Commission endorsed. During the pendancy of the FCC's line sharing investigation, Qwest – then US WEST—argued that the price of the HFPL should be set at a level that reflected the "tremendous value that a [competitive LEC] would obtain by acquiring the loop's data transmission potential."   The FCC expressly rejected this pricing position, on the basis that it did not comport with the requirement that UNE rates be cost-based:

> We reject US WEST's value-based pricing methodology. As we stated in the *Local Competition First Report and Order*, the price for unbundled network elements should be based on forward-looking costs. Setting the price for an unbundled network element based upon the competitive value that the facility confers upon another party does not conform with the TELRIC principles set forth both in this Order and in the Local Competition First Report and Order.[23]

The fact that the Colorado Commission calls its final, approved HFPL rate "negotiated" simply cannot satisfy the FCC's pricing rules. As an initial matter, the term "negotiated" is a grave misnomer for the $4.89 rate approved by the Colorado Commission, since no party actually negotiated this rate with Qwest. Moreover, even if by some stretch of the imagination the rate could be called "negotiated," a voluntarily negotiated rate by itself does not satisfy Section 271's competitive checklist. Specifically, Section 271 requires that interconnection and UNEs be priced in accordance

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[22] CO Cost Hearing Ex. AA (Direct Testimony of Rex Knowles), Ex. 1, ¶ 26.

[23] *Line Sharing Order*, ¶ 157.

with Section 252(d)(1) – in other words, priced in accordance with TELRIC.[24] To treat the $4.89 price as "negotiated" carries absolutely no assurance that the recurring HFPL rate complies with the TELRIC pricing standards required by section 271 of the Act.

The only TELRIC-compliant rate that Qwest can charge for the HFPL is $0. Unless and until Qwest reduces its HFPL rate to $0, its line shared loop UNE pricing constitutes a clear violation of section 271(c)(2)(B)(i), and its application must be rejected.

2. Loop Qualification/Loop Makeup Information

a. There Is No Evidence That Qwest Provides CLECs With All Loop Makeup Information.

Historically, "because characteristics of a loop, such as its length and the presence of various impediments to digital transmission, can hinder certain advanced services technologies, carriers often seek to 'pre-qualify' a loop by accessing basic loop make-up information that will assist carriers in ascertaining whether the loop, either with or without the removal of the impediments, can support a particular advanced service." [25] Recognizing the critical role that "pre-qualification" plays in facilitating CLEC entry into an incumbent's local markets, the FCC requires BOCs to show as part of their *prima facie* case for Section 271 authority that they meet the ILEC obligation to provide CLECs with nondiscriminatory access to meaningful loop makeup information:

> Whether a prospective customer can be provided a particular advanced service often depends upon the carrier having access to detailed information about available loops, including the actual loop length and the presence of bridged taps, load coils, and digital loop carrier equipment. As the Commission previously has explained, a BOC's duty to provide

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[24] *See* 47 U.S.C. § 271(c)(2)(B)(i) and (ii).

[25] *See BANY 271 Order*, ¶ 140.

nondiscriminatory access to OSS extends beyond the interface components to encompass all of the processes and databases used by the BOC in providing services to itself and its customers ... If new entrants are to have a meaningful opportunity to compete, they must be able to determine during the pre-ordering process as quickly and efficiently as can the incumbent, whether or not a loop is capable of supporting xDSL-based services.[26]

With Test 12.7, KPMG affirmed merely that nine tasks associated with loop makeup information were the same for wholesale and retail customers:

- The same end user information is required in order to submit wholesale and retail queries;

- The process for submitting a loop qual query is consistent for and actually used by wholesale and retail customers;

- Processes for addressing questionable loop makeup information are defined;

- The internal process flow for loop qual queries is consistent for wholesale and retail;

- Contact information for questions regarding loop qual information is readily available for wholesale and retail customers;

- Wholesale and retail customers receive completion notices and can access status of query via the interface submitted;

- Systems and processes are in place to allow both wholesale and retail to query using the customer address;

- Loop qual response types are consistent between wholesale and retail; and

- Escalation process is consistent for wholesale and retail.

The limited scope of KPMG's inquiry does nothing to ensure that Covad is able to access all loop information that it needs in order to market services. By its very terms, Test 12.7 indicates that at no point did KPMG look at whether CLECs have access to all

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[26] BANY 271 Order, ¶ 141.

loop qualification information resident anywhere in Qwest's loop qual or back office databases, or other records (such as engineering records). In other words, KPMG's testing fails to show that Qwest makes available to CLECs all loop qual information that it is legally obligated to provide.

The FCC stated several years ago in the *UNE Remand Order* that ILECs must "provide competitors with access to all of the same detailed information about the loop available to [itself], and in the same time frame as any of [Qwest's] personnel could obtain it, so that a requesting carrier could make an independent judgment at the pre-ordering stage about whether a requested end user loop is capable of supporting the advanced services equipment the requesting carrier intends to install." Further clarifying that obligation in its *Verizon Massachusetts 271 Order*, the FCC stated that the relevant inquiry under the *UNE Remand Order* is not whether an ILEC's "retail arm or advanced services affiliate has access to such underlying information but whether such information exists anywhere in [the ILEC's] back office and can be accessed by any of [the ILEC's] personnel."[27]

The importance of this obligation cannot be overemphasized. If the Commission were to permit Qwest to simply provide Covad and other competing carriers only such loop information as Qwest needed for its own retail service offerings, the Commission would be endorsing Qwest's efforts to stifle innovative broadband offerings. Qwest has both the ability and the incentive to ensure that competing carriers are unable to offer consumers any broadband products that are more innovative than Qwest's own retail

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[27] *In the Matter of Application of Verizon New England, Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions) and Verizon Global Networks Inc., for Authorization to Provide In-Region, InterLATA Services in*

products. The easiest way to accomplish that goal is to deny such competitors any access to the loop makeup information they need to determine customer eligibility for such services. If such loop makeup information is unavailable, competing carriers will be able only to determine whether the customer could purchase service that matches the parameters of Qwest's own retail offerings. Such limits on competition are contrary to the goals of the Act.

At a minimum, Qwest is required, as part of its *prima facie* case, to prove that all loop makeup information available anywhere in any database or records is made available to Covad in a non-discriminatory fashion and timeframe. Such an evidentiary showing is one that an independent third-party tester is uniquely positioned to provide. In this instance, however, KPMG's testing fell decidedly short. Consequently, so does Qwest's evidentiary showing that it provides competitors with nondiscriminatory access to loop makeup information.

b. Covad Should Have the Right to Audit Qwest's Loop Qual Information To Ensure Parity Of Access And Information In the Future.

An audit requirement makes eminent good sense. The FCC has always emphasized that CLECs should obtain loop information in the same time and manner as the BOC's retail operations. The only way to ensure that the RLDT contains the same information available to Qwest's retail operations is to allow competitors to make manual loop make-up requests (which the Colorado Commission ordered Qwest to provide) and to audit Qwest's loop qual information (which the Colorado Commission declined to require), if it appears to be necessary. Nothing in the FCC's decisions prohibits such a

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Massachusetts, Mem. Op. and Order, CC Docket No. 01-8, FCC 01-130, 41454 & 58 (Apr. 16, 2001) ("*Verizon Massachusetts Order*"). ¶ 430.

safeguard. To ensure parity with Qwest retail operations, CLECs should be able to request an audit of information available to Qwest pertaining to the Loop qualification tools.

Importantly, the audit right should not be limited just to the information available to Qwest retail ordering personnel. In the *SBC Kansas/Oklahoma 271 Order*, the FCC stated:

> In the *UNE Remand Order*, we required incumbent carriers to provide competitors with access to all of the same detailed information about the loop that is available to themselves, and in the same time frame, so that a requesting carrier could make an independent judgment at the pre-ordering stage about whether a requested end user loop is capable of supporting the advanced services equipment the requesting carrier intends to install. At a minimum, SWBT must provide carriers with the same underlying information that it has in any of its own databases or internal records. **We explained that the relevant inquiry is not whether SWBT's retail arm has access to such underlying information but whether such information exists anywhere in SWBT's back office and can be accessed by any of SWBT's personnel**.[28]

The FCC even went so far as to state:

> **To the extent such information is not normally provided to the incumbent LEC's retail personnel, but can be obtained by contacting incumbent back office personnel, it must be provided to requesting carriers within the same time frame that any incumbent personnel are able to obtain such information**.[29]

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[28] In the Matter of Joint Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Kansas and Oklahoma, *Memorandum Opinion and Order, CC Docket No. 00-217, FCC 01-29, ¶ 121 (released. January 22, 2001) ("SBC Kansas/Oklahoma 271 Order")(Citations omitted);* See also, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, *Third Report and Order, CC Docket No. 96-98, FCC 99-238, ¶¶ 427-31 (released November 5, 1999) ("UNE Remand Order"),* In the Matter of Application of Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions) And Verizon Global Networks Inc., For Authorization to Provide In-Region, InterLATA Services in Massachusetts, *Memorandum Opinion and Order, CC Docket No. 01-8, FCC 01-130, ¶ 54 (released April 16, 2001) ("Verizon Massachusetts 271 Order").*

[29] UNE Remand Order, *¶ 151.*

Therefore, the scope of the audit ordered by the Commission should be broad enough to permit CLECs to (1) ascertain what loop information is accessible to any Qwest employee, not just what is available to Qwest's retail representatives, and (2) go beyond the information in the tools and the databases that feed those tools and to include an audit of Qwest's paper records, including engineering records, back office systems and databases. Under the FCC's parity standard, CLECs are entitled to have access to any loop information that is accessible by any Qwest employee, whether they access it or not, and not just the information that Qwest has selected and placed in its loop qualification tools. Absent audit access to all loop qual information, CLECs would have no way of ascertaining the completeness of Qwest's loop qualification tools. In other words, there would be no way to assess whether Qwest is providing parity access to loop information as mandated by the FCC. Given the FCC's historical concerns and requirements for the provision of loop qual information, Qwest should be required to include an audit right in the SGAT.

There is a well-documented need for a right to audit all loop qual information resident in the Qwest network. Until uncovered by CLECs less than one year ago, Qwest regularly skipped updating loop qual information that fed the RLDT and other wholesale loop qual tools. Instead, with its "Employee Training of LFAC Updates" documentation, Qwest instructed its outside plant personnel to update outside plant information when they determined that the outside plant differed from the information contained in LFACs. Critically, Qwest permitted its outside plant personnel to update that information either through a sales referral directly to Qwest's retail DSL division *or* through a database update.

Furthermore, Qwest's bulk prequalification of loops in its RLDT system using information derived from MLT raises significant parity issues. Specifically, there is no dispute that Qwest ran a bulk MLT on all loops connected to its switches throughout its region. There is also no dispute that Qwest collected those results from the MLT test. Finally, Qwest extracted one component of that information (the MLT length), and populated the RLDT with that length. The question that remains is what happened, and to what use did Qwest put, all the remaining MLT information? It strains credulity that Qwest, armed with information that would permit it to solicit every end user now qualified for xDSL service, simply threw it away. Rather, the only reasonable conclusion to reach is that Qwest took that information and used it to aggressively solicit potential DSL customers. Of course, while Qwest is capitalizing on real time, reliable loop qual information, Covad is deprived of that information to its competitive disadvantage.

Covad's very serious concerns about being limited to the RLDT database are not mere hypothesis or speculation. During the course of the Colorado FOC trial – which involved only stand-alone SDSL loops (which Qwest never utilizes to provision xDSL service), Covad undertook a contemporaneous analysis of the accuracy of the RLDT. Even a cursory review of some of the orders submitted by Covad during the course of the FOC trial[30] demonstrates that Qwest's RLDT suffers from numerous and severe deficiencies:

> (1) Covad was unable to pre-qualify 70 orders because the RLDT either did not recognize or contain information for the end user's telephone number, or the RLDT did not recognize a direct match even after that address had been validated against Qwest's address validation data base;

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[30] This document was provided by Covad to Qwest via email on June 7, 2001.

(2) no distance was available for 14 orders;

(3) no MLT distance was provided on 27 orders;

(4) for 19 line shared orders, placed on Qwest's "jeopardy list" on May 7 and May 14, 2001, the RLDT indicated no bridge tap or load coil was present when, in fact, bridged tap and load coils were on the line[31]; and

(5) 35% of the orders submitted resulted "in a no working telephone number response" that materially impeded Covad's ability to use the RLDT.

This itemization, standing alone, demonstrates that Qwest's RLDT fails to provide CLECs with meaningful loop makeup information. Yet, it does not even begin to address the "false positive" scenario in which the information provided by the RLDT shows that an order can be successfully placed and closed, and yet it cannot. In this regard, Covad provided Qwest seventeen examples in which the RLDT indicated a non-loaded loop of 12,000 feet or less and, yet, the order was cancelled. Nor does this itemization include the problem of "false negatives", or the situation, of which Covad provided Qwest several examples, where a CLEC can successfully close an order even though the RLDT indicates otherwise (*e.g.*, ADSL orders closed where pair gain purportedly on the line). Finally, this itemization does not include those situations in which Covad cannot pre-qualify at all a new Qwest voice customer who seeks data service from Covad until up to thirty days after that customer has begun receiving voice service from Qwest.

Even as Qwest attempted to "nit pick" Covad's findings, challenging only eighteen examples provided, Covad continued to unearth additional problems with the RLDT. More specifically, Covad determined that, depending on the validation method used (*i.e.*, telephone number versus address), more or less information is provided. For

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[31] This itemization was provided by Covad to Qwest via facsimile on June 12, 2001.

example, on one particular order, the RLDT provided loop makeup information when the telephone number was used, but provided no information when the validated address was used. On another order, the validated telephone number pulled up the wrong address, while the validated address indicated that there was no working telephone number on the premises. Equally problematic are orders in which one address pulls up two telephone lines with the identical telephone number—an obvious impossibility—but with *different* loop makeup information.

Moreover, there is no consistency within Qwest's RLDT. Where pair gain is on the line for one PON, no MLT distance and no segment loop length are provided. Yet, on another PON, even though pair gain is on the loop, the segment loop length is included. Similarly, in one screen shot for one particular loop segment, Qwest's RLDT suggests that the loop is non-loaded (as designated by the "nl" indicator in the make up description) even though load coils also are apparently present on the loop.

Notably, Qwest itself has recognized that the RLDT is unreliable. At the commencement of the FOC trial, Qwest made clear that CLECs were required to use the RLDT prior to placing an order. As the trial progressed, Covad noted that Ms. Liston no longer included in her description of the FOC trial the requirement that CLECs utilize the RLDT. The explanation for Ms. Liston's curious silence became evident when she was compelled to describe, for example, orders in which Qwest was able to provision ADSL orders where pair gain was on the line.

In sum, given Covad's serious concerns about the poor quality of the information Qwest makes available to competitors, and Qwest's failure to demonstrate that it provides competitors with nondiscriminatory access to loop makeup information, the Commission

should ensure that Covad has the right to audit Qwest's loop qual information to ensure parity of access and information in the future.

c. Qwest Should Be Required To Provide Pre-Order Mechanized Loop Testing.

It is painfully evident that Qwest's RLDT drastically impairs Covad's ability to compete. Coupled with the fact that Qwest refuses to ensure that the line shared loop UNE will meet any particular technical specifications (such as no foreign voltage, opens, grounding, maximum db loss, etc.), Covad is placed at a distinct competitive disadvantage vis-à-vis Qwest. Therefore, in order to work around the significant obstacles created by Qwest's own poor record-keeping system, and to remedy Qwest's failure to show that it provides parity access to loop makeup information, Qwest should be required to perform pre-order mechanized loop tests for all orders placed by Covad.

The gravamen of Covad's request that Qwest perform a pre-order mechanized loop test ("MLT") is simple: Covad seeks a test that will provide some assurance that the loop delivered by Qwest to Covad does, in fact, have data continuity and is capable of supporting xDSL services. In a nutshell, the MLT is a method by which a CLEC can remotely test the customer's loop by using the same switch-based test capability used by Qwest. An MLT provides reliable and, more importantly, real time information regarding the makeup of the loop, including almost one hundred data points, such as electrical impedance, shorts, grounds, foreign voltage, etc.[32]

Needless to say, this information will help Covad determine loop quality prior to attempting to deliver service to the end user. It will also assist in determining if Qwest

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[32] The entire listing of data points captured by an MLT can be found at http://www.qwest.com/wholesale/downloads/2002/020617/AppE_0617.doc

has completed the wiring in the Central Office, which is critically important in light of Qwest's admission that the "trigger" for its service order completion notification is not actually the completion of cross-connects, which will be discussed in greater detail below. If Qwest were to upgrade their MLT, as other ILECs have done, it could also test the splitter wiring. MLT is a simple test, utilized regularly by both Qwest and CLECs in the repair context, which requires only about 20 seconds to perform. It is simple, easy, cost-efficient, and ensures that a good loop is delivered.[33]

That a pre-order MLT will greatly enhance the quality of the loops delivered is indisputable. From a straightforward technical perspective, if Qwest were to allow Covad to perform pre-delivery MLT testing and if Qwest would test the completed line sharing order in the Central Office for Covad (just as it does for its retail customers), delivery of bad or incorrectly provisioned loops would be greatly minimized. Qwest tests their own retail service orders simply by using a router in the central office to determine if there is a data path to the DSLAM. This test, along with the ANI/dial tone test ensures that the circuit wiring was completed properly.

The technical assumptions regarding the advantages of an MLT are born out in fact. Covad conducted a pre-order MLT trial with Verizon. Generally speaking, the impetus of the trial was the fact that Covad experienced numerous wiring and installation problems in central offices – just as it experiences today wiring and installation problems

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[33] Covad has repeatedly asked Qwest to use a router to test for end to end data continuity, but they have refused. Qwest also declined to use the router test, claiming that they use a different technology so their router would not work to test our circuit. Covad offered to furnish routers if Qwest would use them. Qwest still refused. Now, Qwest has upgraded to the same technology used by Covad so the router they use for their retail circuit testing will work for a Covad circuit as well. Qwest has offered other solutions, such as using a Line Sharing Verification Tool (LSVT), to test data continuity, but the Central Office technicians must both be trained in its use, and required to use it, in order for it to help solve the problem. In Covad's experience, this has not been the case.

in Qwest central offices. Covad also was experiencing loop conditions that were not indicated in the loop qualification data (just as we experience today with Qwest) and also some loops that were marginally acceptable for voice service, but with electrical faults that would not allow data services. The pre-test MLT, which was performed by Verizon, enabled Verizon to identify and correct problems prior to loop delivery, rather than after order closure by the ILEC, which cut down on the time and money both parties incurred to remedy provisioning problems. As a result of that trial, Covad experienced a dramatic increase in the number of "good" line shared loops delivered by Verizon, with a consequent, significant decrease in the interval for delivery.

From a customer perspective, the Verizon trial gave Covad additional credibility and confidence that the requested loop was provisioned intact in the Central Office. It also provided Covad with a means by which to ensure and enhance its business reputation, which had been suffering unduly as a result of Verizon's inability to provision good loops and which our customers attributed to Covad, and not to Verizon.

It is important to note at this point that, of all the loop types offered by Qwest to CLECs, only line shared loops do not come with any kind of guarantee as to the technical specifications. For example, according to Qwest (as well as its on-line product catalog or "PCAT"), 2 wire non-loaded and ISDN loops are guaranteed to meet specified technical parameters at the time of delivery. Similarly, per the PCAT, both distribution subloops and line shared distribution subloops are guaranteed to meet specified technical parameters at the time delivery. It is only line shared loops that Qwest refuses to provide any kind of technical guarantee, and instead will only affirm that line shared loops have a limited amount of bridged tap and load coil. This is particularly troubling since Qwest

primarily provides a line shared DSL product and Covad, generally speaking, is Qwest's only significant competitor in the line shared DSL space in the Qwest region.

There is no technical impediment to running a pre-order MLT. As Qwest itself admitted, when Qwest did its bulk loop prequalification, it used an MLT to populate the RLDT. Qwest's decision to perform the test, retain the results for itself, but populate only some of the information in the RLDT dispels any objection to performing such a test. Moreover, the value of the information that the MLT provides to CLECs has been borne out by Verizon's implementation of access to MLT information. Consequently, as the FCC observed in the *Verizon Massachusetts Order*, Verizon "has begun implementing access to manual loop qualification [including the MLT] as a pre-order function . . . with complete implementation expected in October 2001."

As discussed at length above, Qwest has failed to demonstrate that it currently provides competitors with non-discriminatory access to loop makeup information. Furthermore, as discussed above, Covad has significant reason to believe that Qwest has not made available to competitors all of the loop makeup information available to its personnel. In light of Qwest's failure to meet its evidentiary burden, and its likely failure in fact to meet its ILEC obligations to provide nondiscriminatory access to loop makeup information, Qwest should be required to provide pre-order MLT before its application for Section 271 relief is granted.

3.   **Qwest Sends Erroneous And Unreliable Service Order Completion Notices For Line Shared Loops.**

At the end of the provisioning process for line shared loops, Qwest provides a Service Order Confirmation ("SOC") or completion notice, which can be received via email or accessed on a secure website via a service delivery gateway. At least

presumably, the SOC tells Covad that the line shared loop order has been provisioned correctly and by the date and time contained in the SOC. Thus, Covad, like other CLECs, rely upon the SOC to begin billing and providing customer care to their customers (as well as triggering the billing date for Qwest to Covad). In short, the SOC tells Covad that the customer is its own. Since Covad provides DSL on a wholesale basis to unaffiliated ISPs, the SOC also triggers a notice from Covad to the ISP letting them know that the loop has been delivered and is ready for the next steps in service provisioning (i.e., addition of the IP layer and shipment of the self-install kit). The ISP then passes that information to its customer(s) and commences providing service.

On a large percentage of Covad orders that receive SOCs, the cross connections necessary to provision the loop to Covad's collocated facilities are poor, problematic or non-existent. Thus, despite receiving a SOC, Covad has later found that loops are not yet provisioned. Quite obviously, this failure can cause a host of problems for Covad, since it relies upon the SOC as notice that the loop is Covad's. Just as with unreliable FOCs, which creates a whole host of problems in terms of managing customer expectations, Covad is left in the lurch, without any information as to why service has not been provisioned.

Covad has raised this issue with Qwest. Qwest's response uncovered the real problem: Qwest is not necessarily completing loop orders before it sends the SOCs. At the CLEC Forum in Denver in May 2002, Qwest informed Covad that the SOCs for the line shared loop UNE orders are not triggered by work events (such as actual completion of a loop order). Instead, Qwest stated that the SOC is sent without regard to the work performed, and instead is triggered and automatically sent on the due date provided in the

FOC. This admission, while not surprising, raises a host of operational problems for Covad.

> **a. Qwest's Artificial Notification Process Imposes Anti-Competitive Burdens on Covad.**

First and foremost, the fake SOC that Qwest provides Covad eliminates Covad's ability to know when or if a loop has been provisioned, since the SOC is the last indicator Covad receives from Qwest closing out the order. Qwest's SOCs do not perform this critical function. This translates into a number of provisioning problems, including (a) an improper elongation of the installation interval which adds to Covad's costs and impairs our relationship with the end user customer who believes we cannot competently provision service; and (b) the imposition of additional costs and lost resources because of the administrative time and cost of opening a trouble ticket, troubleshooting, potentially rolling a truck and working with both Qwest and the customer to resolve a Qwest problem that never should have occurred.

Moreover, because Covad cannot rely upon the SOC, it has no idea if a problem on a SOC'd loop order is caused by either Qwest's failure to complete the order as of yet, or some other problem. Covad is left to guess whether it should open a trouble ticket on that loop or wait in hopes that Qwest gets around to doing the work it should have done before providing us the SOC. It appears that for some reason Qwest is intent upon sending SOCs without having done the necessary work to assure the accuracy of these critical OSS notices.

Qwest has the duty and obligation under the Act of delivering a functioning loop to Covad. To shift the burden and expense onto CLECs to correct a Qwest problem is patently unfair, improper and grossly anti-competitive. Qwest must be required to correct

its SOC process to link it to the actual completion of work. Until Qwest does that, it cannot demonstrate that it is meeting its obligations under Checklist Item 4 of the Act.

b. **Qwest's Fake SOCs Artificially Improve Its Reported Performance.**

The data point that Qwest appears to rely upon to determine the interval in which it delivers line shared loops is the SOC – service order confirmation – which alerts Covad that all work in the central office has been completed. However, as stated above, because the SOC is not triggered by actual work completion (i.e., the completion of all necessary cross-connects in the central office), but rather is an administrative close triggered by some non-work related event, Qwest's reported performance in delivering line shared loops bears no relation to its actual performance in delivering line shared loops. In other words, the manner in which Qwest issues SOC notices renders its reported performance in provisioning line shared loops wholly unreliable and inaccurate.

4. **Qwest Sends Erroneous And Unreliable Firm Order Confirmations For Covad Loops.**

a. **Fake FOCs Impose Anti-Competitive Operational Burdens On Covad.**

PO-15 measures the number of *Qwest-caused* due date changes per order submitted by a CLEC. According to Qwest's own PID reports for Covad, in every single one of the past twelve months, Qwest's performance has been drastically and statistically significantly discriminatory with respect to Covad, with Qwest making far more due date changes per Covad order than for its own orders. In fact, in the three most recent months, Covad had *six times* more Qwest-caused due date changes per order than Qwest had on its own orders. There is no doubt as to the consistency and magnitude of Qwest's discriminatory conduct.

The negative ramifications of Qwest's "fake FOC" problem are innumerable. After Covad places its order with Qwest, Qwest responds first with an acknowledgment that it received the order – the LSRC. After receipt of the LSRC, Qwest returns a Firm Order Commitment ("FOC") to Covad. A FOC serves two main purposes. First, it tells Covad that Qwest has accepted the order and that the order was properly filled out in form and content. Second, the FOC tells the CLEC that its order can be provisioned (e.g., facilities are available) and the FOC gives the CLEC a date by which the ILEC commits to fulfill the order. Thus, Covad, like other CLECs, uses the FOC to manage its own workforce to prepare for fulfillment of an order. We also use the FOC to manage customer expectations of when an order will be fulfilled. It is therefore essential that the FOC is accurate and timely.

As the Covad-specific PID Reports show, on numerous orders, after receiving an initial FOC with a committed due date, Qwest then sends Covad a second FOC with a new committed due date. Qwest should not be sending multiple FOCs. What these problems should tell the Commission is that Qwest is not doing the work necessary before it sends a FOC. When the ILEC sends a FOC it should have already determined that (1) the order was properly filled out by the CLEC, and (2) that the order can be fulfilled by the ILEC on a date specified on the FOC. The receipt of multiple FOCs, demonstrates that Qwest is not doing the preliminary work necessary before it sends the FOC to the CLEC.

Because of Qwest's failure to do the necessary work prior to issuing a FOC, Covad is compelled to expend scarce resources to determine the actual delivery date and to mend damaged customer relationships. By way of example, following receipt of a

FOC, Covad informs its partner/ISP of the FOC date which, in turn, informs the end-user (the ultimate customer) of the loop delivery date to which Qwest has "committed." When Qwest sends a subsequent FOC, or puts in jeopardy an order that was already FOC'd, Covad must then call its ISP and/or end-user customer to reschedule the provisioning date. Because the end-user must often take time off from work to provide access to the Qwest technician, Qwest's failure to meet its firm order "commitment" results in a rescheduling of the FOC and the end-user must take additional time off from work. End-user frustration and consequent damage to Covad's reputation and credibility necessarily flow from such rescheduling and repeated rescheduling.

Equally significant is the negative impact on Covad's relationship with its customer when it tries to explain why the date for the delivery of its DSL loop must be rescheduled because of the receipt of multiple FOCs with revised due dates. Simply put, Covad's explanation – that Qwest misinformed Covad of the installation date or missed the installation altogether – sounds precisely like it is "passing the buck." As a consequence, Covad's credibility is undermined, thereby creating the possibility that the end-user will opt to go with another DSL provider, like Qwest.

Covad pays the price for Qwest's poor FOC and loop delivery performance in the form of strained and/or lost customer and end-user relationships. Because it appears that Qwest does not treat its own end-users in a comparably unprofessional manner, the Commission must ensure that such disparate treatment ceases immediately by demanding that the FOC date provided by Qwest include a measurable level of credibility and that Qwest meet its obligation to timely provision loops rather than make meaningless promises that it will do better.

The fact that PO-15 is labeled a "diagnostic" standard is irrelevant. As the third party vendors indicated in both the Colorado and Washington hearings on the KPMG Final Report, the fact that a measurement is diagnostic in no way precludes a finding that a failure to perform at parity disposes of the issue of whether CLECs have a meaningful opportunity to compete. To the contrary, performance under a diagnostic measure can indicate discrimination that is competitively significant and meaningful.

Qwest clearly is not fulfilling its obligations under the Act to generate FOC notices that provide competitors a "meaningful opportunity to compete."[34] In order to remedy the problems created by Qwest's poor provisioning processes, a number of steps must be taken. First, Qwest should be required to physically verify facilities before providing the FOC. Only through doing such a verification can Covad rely comfortably on the FOC provided. Second, Qwest should be required to include PO-15 in the CPAP so as to create an incentive on the part of Qwest to do the work necessary to provide a reliable FOC before it is sent to CLECs. Finally, Qwest should be required to credit CLECs an amount equal to the due date change charge Qwest assesses CLECs when a CLEC changes a due date. Unless and until all three steps are taken, Qwest cannot be deemed to have satisfied its obligations under the Act.

5.   Qwest's Line Shared Loop UNE Performance Is Unacceptably Poor.

Qwest's line sharing maintenance and repair performance casts into doubt Qwest's commitment to competition in Colorado. To provide some context, it is clear that Qwest currently really only has one competitor in the DSL market in the state of Colorado -- Covad. Perhaps unable to resist its monopolistic tendencies now that only

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[34]   *BANY 271 Order*, ¶ 86.

one competitor is left standing, Qwest is not providing CLECs – and particularly Covad –

with a meaningful opportunity to compete:

> MR-3A.   Qwest failed to perform at parity in one of the four most recent months reported and three of the seven months reported.
>
> MR-3C.   Qwest failed to perform at parity in one of the three most recent months reported.
>
> MR-4A.   Qwest failed to perform at parity in one of the four most recent months reported and two of the five most recent months reported.
>
> MR-4C.   Qwest failed to perform at parity in four of the five most recent months reported.
>
> MR-6A.   Qwest failed to perform at parity in one of the four most recent months reported and two of the five most recent months reported.
>
> MR-6C.   Qwest failed to perform at parity in three of the four most recent months reported and in nine of the total eleven months reported.
>
> MR-7A. Covad's line shared loops within MSA had chronic repeat trouble rates in the four most recent months, ranging from an abysmal 38% of orders experiencing a repeat trouble to almost 70% of orders experiencing a repeat trouble.
>
> MR-7C. Covad's line shared loops, no dispatch, had chronic repeat trouble rates in the four most recent months, ranging from an abysmal 35% of orders experiencing a repeat trouble to almost 42% of orders experiencing a repeat trouble.

Qwest attempts to explain away its poor line sharing M&R results by directing the

FCC's attention to the OP-5 and MRx "*" PIDs.   Qwest has provided data for the "*"

PIDs in an effort to improve its reported performance, particularly where that

performance hasn't met the agreed-upon performance measures. The problem, however,

with the "*" PIDs is that they do not come with any indicia of reliability. Specifically, in

its response to a Washington Commission Bench Request, Qwest conceded that the

additional steps it takes to produce results under "*" PIDs have never been audited by

any third party.   A great deal of skepticism regarding the accuracy of any data produced pursuant to the "*" PIDs is, therefore, in order, particularly in light of the problems uncovered by Liberty in connection with the "scrubbing," coding and reporting of trouble tickets, as reflected in Observation 1028.

Qwest also states, through its witness Karen Stewart, that Qwest's discriminatory treatment in the maintenance and repair of CLEC line shared loops should be ignored because trouble reports on line shared loops are designated as *service impacting* and thus placed at a lower priority than *out of service* conditions for voice loops that have higher priority in the repair queue.   According to Stewart's characterization, Qwest's poor performance for maintenance and repair of line shared loops is thus merely an artifact of applying Qwest's performance for voice loops as a benchmark (notably, a benchmark proposed by Qwest).   Stewart's characterization, however, is entirely contradicted by the testimony of Qwest witness Michael Williams, who stated, in response to ATT and Covad questions about how Qwest defined out of service for data or line shared loops,[35] that Qwest had changed its procedure to treat all line shared trouble reports as out of service reports.   According to Qwest's own testimony, all line shared loop UNE trouble tickets should be coded as out of service reports and given priority within the repair queue.   Thus, one of the two reasons provided by Ms. Stewart is factually inaccurate, rendering Ms. Stewart's testimony inapplicable as an attempt to explain away Qwest's poor maintenance and repair performance.

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[35] Per the PIDs, an out of service condition is defined as the inability to make or receive calls. For data or the data portion of line shared loops, however, that definition is completely inapplicable since the data or data portion of a line is never utilized to make or receive calls.

In light of Qwest's poor and unduly discriminatory performance in the one area where it provides a DSL service, Qwest cannot be deemed to have complied with its obligations under the Act. Unless and until Qwest can demonstrate that it accords parity treatment to Covad in the maintenance and repair of its line shared loops, Qwest's application for Section 271 relief must be denied. At a minimum, therefore, Qwest must be required to (1) retrain its technicians in the maintenance and repair of line shared loops; (2) commit to dispatching technicians trained in the repair of line shared loops (and not POTS lines) upon the opening of a trouble ticket by a DLEC; (3) commit to the posting of documentation in the COs to facilitate the correct maintenance and repair of line shared loops; and (4) commit to receiving authorization from Covad before closing out any trouble tickets.

6.   Qwest New Build and Held Order Policy

a.   Qwest's Build Policy Is Not Consistent With Controlling Law

The FCC has made clear that BOCs must construct facilities for CLECs under the same terms and conditions as it would build for itself:

> The duty to provide unbundled network elements on "terms and conditions that are just, reasonable and nondiscriminatory" means, at a minimum, that whatever those terms and conditions are, they must be offered equally to all requesting carriers, and where applicable, they must *be equal to the terms and conditions under which the incumbent LEC provisions such elements to itself.*[36]

While Qwest agrees, in Section 9.19 of its SGAT, to build under the same terms and conditions as for its retail customers, Qwest also states that it will always bill its wholesale customers for the construction job. To the extent, however, that Qwest might construct for its retail customers and not bill them for the construction job, it should not

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[36] *Local Competition Order*, ¶ 315.

be permitted to bill its wholesale customers. At a minimum, therefore, Qwest must revise its SGAT to make clear that the "terms and conditions" also include when, or when not, Qwest charges its wholesale customers.

> **b.   Qwest's Held Order Policy Raises Parity Concerns**

In May 2001, Qwest implemented a "new build policy," in which it states that it will reject all orders where there are no facilities and Qwest has no plans to build any facilities to fill that order.[37] Under the policy, Qwest will reject orders if no facilities will be or are anticipated to be available.   In real world terms, what this means is that Qwest will never assign a due date unless and until it knows for certain facilities are available and the order can be provisioned. Qwest's new build policy has the discriminatory effect of placing wholesale customers on different footing than its retail customers, which are allowed to wait in a queue for facilities to become available.

Qwest has stated that, despite its policy, implementation has been quite different. That is, Qwest has represented that it will actually hold wholesale orders for thirty business days before rejecting them. However, the supposed policy is nowhere to be found in the Colorado SGAT, and the percentage of Covad orders going into held status is not consistent with a hold due to lack of facilities. At a minimum, therefore, Qwest must include its supposed method for holding wholesale orders in the Colorado SGAT. For the convenience of the Commission, Covad provides the following language for inclusion in the Colorado SGAT:

> **"Lack of Facilities; Priority Right to Facilities.** In the event Qwest notifies CLEC that facilities ordered are not available from Qwest at the time of the order, Qwest shall maintain the order as pending for a period of thirty (30) business days.   If facilities

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[37] *See* Exhibit 922 (CLEC Notification of Network Build Policy, JML-37).

become available to fill the order within that thirty (30) business day period, Qwest shall notify the CLEC of such availability. CLEC and Qwest acknowledge that the availability of facilities hereunder is on a first come, first served basis. Any facility orders placed by any other provider, including Qwest, which predate CLEC's order shall have priority in any facilities made available under the terms of this section."

Inclusion of this language will alleviate the parity concerns raised by Qwest's policy of holding its retail orders as facilities become available but not its wholesale orders.

c. Qwest's Held Order Policy Improperly Improves Its PID Performance Without Any Improvement In Its Actual Performance.

A critical concern that would remain unaddressed by the inclusion of Covad's language for held orders is the impact of Qwest's "held order" policy on its reported performance. Put simply, because Qwest continues to reject orders for which facilities are not available, it materially, but artificially, improves its reported performance. For the key ordering and provisioning ("OP") measurements, including OP-3 (installation commitments met), OP-4 (installation interval), OP-6B ("measures the average number of business days that service is delayed beyond the original due date provided to the customer for *facility reasons attributed to Qwest*") and OP-15 ("reports the number of pending orders measured in the numerator of OP-15A that were delayed for *Qwest facility reasons*"), the process is as follows. A CLEC submits an LSR to Qwest. Upon receipt, Qwest assigns the appropriate facility, if available, and issues a FOC to Covad which contains the date on which the loop will be delivered. If no facility is available to fill a loop order, then Qwest (under its supposed, but in Colorado undocumented) policy, holds the order for thirty business days.

Importantly, under the Qwest held order policy, no due date is ever communicated to the CLEC when an order goes into held status. Indeed, no due date – or FOC – is ever provided to the CLEC unless and until Qwest is confident it can and will fill the order. Because no FOC (with the due date) is ever provided unless and until the order can be filled, Qwest automatically positions itself to always meet the due date, thereby always meeting its OP-3 and OP-4 targets, and automatically caps the number of delay days on any given order, which is measured by OP-6 and OP-15. In so doing, Qwest circumvents its wholesale service performance obligations under the QPAP and, more specifically, PID measures OP-3, OP-4, OP-6B and OP-15B.

Qwest's reporting policy raises another concern specific to the purpose of OP-6 and OP-15. Both OP-6 and OP-15 are designed to measure delay days due to a lack of facilities. Underlying the parties' agreement on the definition and implementation of these measures was to monitor whether Qwest is capable of and does fill CLEC orders or whether competition is being stymied because Qwest unreasonably refused to invest appropriately in its network. Thus, the rationale underlying the development of these PID measures is neither immaterial nor competitively insignificant; these PIDs are designed to determine whether, consistent with its obligations under federal law, Qwest is actually filling loop orders consistent with CLEC demand.

Qwest must provide to CLECs, including Covad, "[l]ocal loop transmission from the central office to the customer's premises, unbundled from local switching or other services."[38] Subsumed within the definition of a "loop" are "two-wire and four-wire loops that are conditioned to transmit the digital signals needed to provide service such as

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[38] 47 U.S.C. ¶ 271(c)(2)(B)(iv).

ISDN, ADSL, HDSL, and DS1-level signals."[39] To satisfy its obligation under § 271, therefore, Qwest must prove not only that it has a concrete and specific legal obligation to furnish x-DSL capable loops, but also that it is *providing these loops to competitors consistent with their demand and at an acceptable level of quality*.[40]

Qwest's held order policy allows it to report acceptable performance even if it is not fulfilling its obligation to provision reasonable order demands by CLECs at an acceptable level of quality. In other words, Qwest's held order policy paradoxically allows it to demonstrate that it is meeting checklist compliance by excluding from its performance measures those orders that show it is not. Qwest thus should be ordered to revise its held order policy in order to permit this Commission to accurately review and determine whether Qwest is providing unbundled loops consistent with CLEC demand. First, Qwest must be required to report on the number of orders held due to a lack of facilities and the duration of the hold (OP-15), and delays due to lack of facilities (OP-6), regardless of whether those orders are ever completed. Second, Qwest must also be required to report its performance on orders that are held but later filled, measuring that interval from the time the order is first submitted by the CLEC until the order is filled by Qwest (OP-3 and OP-4).

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[39] *Local Competition Order*, ¶ 380; *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* Mem. Op. And Order, CC Docket No. 96-98, FCC 99-238 (Rel. Nov. 5, 1999) ("*UNE Remand Order")*, ¶ 166-167.

[40] *BANY 271 Order*, ¶ 269; *Application of BellSouth Corporation Pursuant to Section 271 of the Communications Act of 1934, As Amended, To Provide In-Region InterLATA Services in Louisiana*, Mem. Op. And Order, CC Docket No. 98-121, FCC 98-271, (Oct. 13, 1998), ¶ 54 ("*BellSouth Second Louisiana Order*").

7.   Qwest's Processes Are Replete With Human Error.

KPMG found that there are excessive amounts of human errors being made by Qwest personnel as they process CLEC orders. These human errors directly impact Qwest's reported commercial performance since some of the errors result in longer than standard due dates being assigned, as well as the improper inclusion or exclusion of orders from the performance results.

The "human error" problem was detected a number of times during the OSS tests. Initially, the problem was identified in O3086 after KPMG noted that a number of problems encountered by KPMG and HP were attributed by Qwest to human error and that additional training would remedy the problem. After seeing 75 Qwest responses that attributed the problem to human error and prescribed additional training as the remedy, KPMG stated that it had "identified a pattern in Qwest's Observation and Exception responses that refer to the need for additional training and/or training enhancements."

KPMG observed the problem of excessive human error as a direct result of transaction testing and calls to Qwest's help desk. When Qwest personnel were manually handling pseudo-CLEC orders and responding to pseudo-CLEC calls to Qwest's help desk they found that Qwest personnel were making far too many mistakes. Rather than testing to ensure training was effective, KPMG simply interviewed Qwest employees and reviewed documentation – neither of which can determine whether training was effective.

The folly of KPMG's approach to resolution of the human error issue was illustrated by O3110, which was opened after O3086 was closed, and in connection with E3120. E3120 related to orders that fell out even though they should have flowed through the Qwest systems. When reviewing the orders that should not have fallen out,

there were nine LSRs for UNE-P and resale services that were manually processed by Qwest personnel. Out of those nine LSRs, Qwest personnel made human errors on two of them (22.2%). There were also eighteen line shared loop UNE orders that were manually handled by Qwest personnel. Out of those eighteen orders there were at least three errors made on the orders (16.67%).

Rather than do a retest, which should have been done in light of the "military style test" philosophy of this OSS test, KPMG reviewed historical results for orders that Qwest manually handled since the introduction of all the training and other improvements that supposedly should have resolved the human error problem. Of the forty-nine orders manually processed by Qwest, KPMG found Qwest had made human errors on seven of them (14.3%). In total, KPMG examined seventy-six pseudo-CLEC orders that were manually handled by Qwest personnel as part of E3120 and found twelve instances of human error (15.8%). KPMG's determination that 15.8% of the manually handled pseudo-CLEC orders had human errors is ample and sufficient evidence to show that Qwest had, in fact, not remedied the excessive rate of human errors that was the subject of O3086.

The impact of human error is particularly acute for Covad. Even though it clearly is following the correct process in submitting orders that are flow-through eligible, 67% of Covad's GUI order and 44% of its EDI orders for May 2002[41] nonetheless are manually handled by Qwest. During the time period reviewed by Liberty in connection with the data reconciliation, 100% of Covad's line shared loop UNE orders

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[41] In the past four months, no less than 40% of Covad's EDI orders and 50% of its GUI orders are manually handled by Qwest.

were manually handled by Qwest. Assuming a somewhat constant rate of human error, a significant percentage of Covad orders will be manually mishandled by Qwest.

Covad's concern regarding mishandling of its orders is founded in fact. During the Liberty data reconciliation, Liberty uncovered a number of errors in Qwest's performance reporting that was the direct result of human error (the other source of error were software coding problems). The errors committed by Qwest resulted in the improper inclusion and exclusion of certain orders, that had an overall affect of incorrectly reporting performance for Covad as well as the aggregate.

Qwest undoubtedly will argue that it has corrected the problem (which Covad disputes and discusses more fully below in the section regarding the Liberty data reconciliation) and that any ongoing concerns will be addressed by the development of PO-20. However, PO-20 does not address all of the issues identified by KPMG in its PID adequacy study, nor does it even begin to address the problem of human intervention and error for many of the products ordered by Covad. More importantly, Qwest thus far has refused to meaningfully commit to including PO-20 into the CPAP, thus rendering PO-20 a paper tiger.[42]

The FCC has stated that, "the reliability of reported data is critical, and that properly validated metrics must be meaningful, accurate, and reproducible."[43] The FCC

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[42] Although Qwest recently proposed a pathway to inclusion of PO-20 in the CPAP, Qwest's proposal is wholly inadequate. Qwest has agreed in principle only to include PO-20 as a diagnostic measure in the CPAP, meaning Qwest would suffer no liability for failure to comply with the measure. Moreover, Qwest's current proposal would not, in any event, result in inclusion of PO-20 as an full measure for at least a year.

[43] Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services In Texas, CC Docket No. CC 00-65, Memorandum Opinion and Order, FCC 00-238, released June 30, 2000 ("Texas Order"), ¶ 428 (note omitted).

has also stated, "the credibility of the performance data should be above suspicion."[44] Here, neither of those criteria can be deemed to have been satisfied here. Qwest must be required to prove, through third party verified transaction testing, that it has corrected the human error problem. Qwest also should be required to implement immediately all of the proposals made by KPMG in the PID adequacy study and to expand PO-20 to include all of those proposals. Further, Qwest should be required to include all product categories into PO-20. Finally, Qwest should be required to include PO-20 upon it finalization into the CPAP and to apply penalties retroactively to compensate CLECs for Qwest errors.

8. Qwest's OP-5 Reporting Calls Into Question The Reliability Of Its Reported Performance For That PID.

Qwest's OP-5 performance reporting cannot be deemed accurate and reliable. IN short, Qwest cannot produce the underlying data for OP-5 and therefore that metric can never be reconciled. What this means is that Qwest can report any kind of new service installation quality that it wants without any opportunity for investigation and reconciliation by a CLEC that believes its commercial experience with new service installation quality is different than what Qwest is reporting. At a minimum, Qwest must be required to revamp its data collection, manipulation and reporting mechanisms for OP-5 so that the data underlying this critical metric can be made available to regulators and competitors during any audits undertaken under the CPAP or otherwise.

9. The Liberty Reports Do Not Substantiate Qwest's Claim That Its Performance Data Is Accurate And Reliable.

From the outset of the OSS checklist item workshops, CLECs complained that Qwest's actual commercial performance was far from optimal. Where data has been

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[44] *Id,* ¶ 429.

provided or testimony given regarding Qwest's actual commercial performance, a significant issue of dispute between Qwest, on the one hand, and CLECs, on the other, was whose data reflected more accurately the CLECs' commercial experience. In order to resolve those types of issues and to minimize the burden placed on state commissions with responsibility for discerning whether Qwest's actual commercial performance complies with its obligations under Section 271, the Regional Oversight Committee authorized the retention of Liberty Consulting Group to undertake a data reconciliation of Qwest and CLEC data for any PID, any sub-measure, any state and any time period. Covad was one of three CLEC participants in the data reconciliation.

Liberty concluded that Qwest's performance data is not materially inaccurate. This is simply not correct. Liberty's Data Reconciliation Report for Colorado first pointed out in the section relating to the Covad data reconciliation that there are "several problems" with Qwest's data reporting processes, including:

(1) improperly including its own retail voice orders with Covad's wholesale line shared loop orders thus increasing by at least 5% the number of orders reported (thereby inflating performance results);

(2) improperly double-counting up to 22% of Covad's 2-wire non-loaded loop orders in consecutive months (again inflating performance results);

(3) improperly excluding up to 70% of the line shared orders Covad included in the denominator when calculating the OP-4 results because of faults in the Qwest data environment; and

(4) improperly excluding up to 66.67% of Covad's line shared and non-loaded loop orders that Covad included in the denominator when calculating PO-5 because of faults in the Qwest data environment.

Because of their numerosity and impact, Liberty concluded that these errors "significantly affected" Qwest's reported data performance results.

It is impossible for Liberty to conclude that Qwest's performance data is accurate and reliable when looking at the specific results for the Qwest-Covad data reconciliation

for Colorado. Specifically, Qwest was able to affirmatively prove that its treatment of Covad's non-loaded loops for purposes of OP-4 reporting was correct in only 61% of the orders sampled. Further, Qwest's performance reporting was affirmatively incorrect on 31% of the orders. Finally, 8% of the orders were inconclusive or in direct conflict since the underlying documentation of both parties supported their respective positions.

The problems in Qwest's reported performance only increases when turning to OP-4 for line shared loops. Qwest was able to affirmatively prove that its treatment of Covad's line shared loops for purposes of OP-4 reporting was correct in only 55% of the orders sampled. Further, Qwest's performance reporting was incorrect on 26% of the orders. Finally, 19% of the orders were inconclusive or in direct conflict since the underlying documentation of both parties supported their respective positions.

Qwest's reported performance data continues to deteriorate when looking at the PO-5 results. Qwest was able to affirmatively prove that its treatment of Covad's orders for purposes of PO-5 reporting was correct in only 44% of the orders sampled. Further, Qwest's performance reporting was incorrect on 38% of the orders. Finally, 18% of the orders were inconclusive or in direct conflict since the underlying documentation of both parties supported their respective positions.

Qwest claims that the problems uncovered by Liberty were corrected. However, there is no evidence whatsoever that that actually occurred. Liberty, through Mr. Stright, conceded in the Colorado workshops on performance data, that good auditing practice is not to rely on simple assertion, but to actually investigate whether a fix is in place. However, Liberty did not comply with this self-described "good auditing practice." Specifically, as Liberty made clear, it closed Observations 1026, 1027, 1029 and 1030

without ever reviewing Qwest's proposed code fixes or OSS updates against actual commercial data. As Liberty admitted in a response to a Records Requisition issued in the Washington 271 proceeding, it had not tested the code fixes against any commercial data generated after the individual code fixes were implemented. What this means is that Liberty never took the time to confirm whether the code fix would actually do what Qwest opined it would do or that such code changes would not impact other elements or components of Qwest's performance reporting data. Thus, there is nothing any party, let alone the FCC, can look at to confirm that Qwest implemented the changes and that they were efficacious.

Liberty's reliance on a code review and "rerun" data is also problematic because (1) Liberty did not uncover the data problems identified in the reconciliation Observations and Exceptions in its initial "code audit" of the PIDs; and (2) Liberty was fully aware of the fact that code changes can and have impacted the accuracy of other areas of Qwest's reported performance data – as Mr. Stright testified in Colorado. Liberty was also aware that it was entirely possible that the code changes implemented by Qwest as a result of errors uncovered by Liberty during the reconciliation could have unintended consequences that create other errors in Qwest's reported performance.

Liberty's decision to close other Os and Es opened during the data reconciliation on the basis of additional training provided by Qwest is equally problematic. Like KPMG, Liberty never confirmed whether that training took place or if it was efficacious, but relied only on interviews and review of training materials.

For all of these reasons, Qwest cannot be deemed to have demonstrated, as it is required to do, that its reported performance data is accurate and reliable.

Conclusion

For the reasons stated herein, the Commission should reject the applications of Qwest for authority to provide in-region, interLATA services in Colorado, North Dakota, Iowa, Idaho and Nebraska.

Respectfully submitted,

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